

NO. 45894-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL BROGAN,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF COWLITZ COUNTY

Before the Honorable Marilyn Haan, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

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A. SUMMARY OF ARGUMENT

The trial court violated appellant Michael Brogan's right to trial by a fair and impartial jury when it instructed the deadlocked jury to return to court following the weekend in order to continue deliberating despite their agreement that there was no possibility of reaching a verdict within a reasonable period of time. Accordingly, this Court should reverse Mr. Brogan's conviction.

B. ASSIGNMENTS OF ERROR

1. Appellant Michael Brogan's right to a fair and impartial jury was violated when the court ordered the jurors to return the following Monday and continue deliberations, despite agreement by all jurors that they were deadlocked and that it was not possible to reach a verdict within a reasonable amount of time.

2. The trial court erred by denying the appellant's motion for mistrial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due Process Clause of the Fourteenth Amendment guarantees the right to trial by a fair and impartial jury, including the right to have each juror reach a verdict uninfluenced by judicial coercion. When, in response to the jury's statement that it was deadlocked, the court ordered the jurors to return the following Monday to continue deliberations, did the court impermissibly

coerce the jurors into returning a guilty verdict? (Assignment of Error 1)

2. Did the trial court err by denying Mr. Brogan's motion for mistrial based on the argument that the court coerced the jurors into returning a guilty verdict when it ordered the jurors to return the following Monday? (Assignment of Error 2)

D. STATEMENT OF THE CASE

1. Procedural facts:

Michael Brogan was charged by amended information filed in Cowlitz County Superior Court with one count of delivery of a controlled substance (heroin), in violation of RCW 69.50.401(1). Clerk's Papers (CP) 6-7. The information contained a special allegation under RCW 69.50.435(1)(c) that the offense was committed within 1000 feet of a school bus route stop. CP 7.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing.

The matter came on for jury trial on December 12, 13, and 16, 2013, the Honorable Marilyn Haan presiding.

The defense noted an objection to the language contained in the special verdict form, requiring the jury to unanimously agree whether the offense was committed within 1000 feet of a school bus stop. Report of

Proceedings (RP) (12/13/13) at 5, 6.¹

On the afternoon of December 13, 2013 the jury notified a bailiff that it was deadlocked. Judge Haan was out of the building and the matter was referred to Judge Stephen Warning. Judge Warning directed the jury to make a written statement regarding its position. RP (12/13/13) at 48. Counsel was not informed of the jury's statement and the jury was not brought into the courtroom. RP (12/13/13) at 48. After Judge Haan returned to the courthouse that afternoon, the court called the jurors into the courtroom and asked the presiding juror "[I]f there a reasonable possibility of the jury reaching a verdict within a reasonable time?" RP (12/13/13) at 49. The presiding juror answered in the negative. RP (12/13/13) at 49. The court then polled each juror to determine whether they agreed that there was no possibility they could reach a verdict. RP (12/13/13) at 50. All jurors agreed. RP (12/13/13) at 50-51.

The jury was brought into the courtroom again and the judge directed the jury to return to court the following Monday, December 16, 2013. RP (12/13/13) at 57. On Monday morning the jury returned a verdict of guilty to the offense as charged and also found that it was committed within 1000

¹The record of proceedings is designated as follows: RP – October 7, 2013, December 5, 2013, December 16, 2013 (jury trial), January 6, 2014, and January 13, 2014,

feet of a school bus route stop. RP (12/16/13) at 12; CP 48, 49. The court polled the jurors and each one responded that the verdicts represented the verdicts of the jury and his or her individual verdicts. RP (12/16/13) at 15-18.

Following reading of the verdict on December 16, defense counsel moved for mistrial, arguing that the jury had returned to court two times on December 13 and announced that they were deadlocked. RP (12/16/13) at 16. After hearing argument, the court denied the motion. RP (12/16/13) at 17-18.

At sentencing, Mr. Brogan requested that he be sentenced to prison-based DOSA. RP (1/13/14) at 30. The court denied the DOSA request, found that Mr. Brogan had an offender score of 2, and imposed a standard range sentence of 16 months and a 24 month school bus route stop enhancement, for a total of 40 months. RP (1/13/14) at 33; CP 50-62.

Timely notice of appeal was filed on January 23, 2014. CP 67. This appeal follows.

2. Testimony at trial:

(sentencing); RP—December 12, 2013 (jury trial); and RP—December 13, 2013 (jury trial).

Lamont Hart testified that on July 6, 2012, he participated in a “controlled buy” of drugs while working as confidential informant for the Longview Police Department. RP (12/12/13) at 73. Hart had been arrested previously for delivery of drugs and entered into a contact with police to buy drugs in order to “work off” the potential charges. RP (12/12/13) at 74. Hart was subsequently convicted of the delivery charge. RP (12/12/13) at 75.

Hart was searched by detectives at a meeting point and provided with \$100.00 in “buy money.” RP (12/12/13) at 77. Hart stated that he contacted Brogan by phone to arrange the drug deal. RP (12/12/13) at 79. He testified that while with the police on July 6, 2012, he called Brogan a second time to make sure the drug deal was still going to take place. RP (12/12/13) at 79, 80. He then rode his bicycle to Brogan’s apartment in Longview, Washington. RP (12/12/13) at 80. Police watched Hart ride his bicycle from the meeting point to Brogan’s apartment, and had observed Brogan standing outside his apartment shortly before Hart arrived. RP (12/12/13) at 51.

Hart stated that he knocked on the apartment door and then went inside. RP (12/12/13) at 81. He testified that he gave \$100.00 in “buy money” to Brogan, who was sitting at a computer, and that Brogan then pointed to a table with a scale on it. RP (12/12/13) at 81. Hart got five bags

from the scale and left the apartment. RP (12/12/13) at 83, 84. Hart rode back to the meeting point and gave the police five bags. RP (12/12/13) at 84. He was searched again and the police found no additional drugs. RP (12/12/13) at 84.

Over defense objection, the prosecution introduced a post from a Facebook page which stated that Hart was “a rat,” that he “did a controlled buy on me,” and that the writer of the post would “have his discovery next week.” RP (12/12/13) at 118. A Longview police detective opined that the Facebook post was made by Brogan. RP (12/12/13) at 118.

An employee of the Washington State Patrol Laboratory testified that he tested the contents of one of the five bags received from Hart by the police and identified the substance as heroin. RP (12/12/13) at 145; Exhibit 2A.

Rick Lecker, transportation manager for Longview School District, testified that there is a designated school bus stop for the Longview School District at 970 Eighth Avenue, Longview, near the location of Brogan’s apartment at 862 Eight Avenue. RP (12/12/13) at 150.

Ruth Bunch Manwell, GIS coordinator for Longview, prepared a map showing a 1000 foot radius around the bus stop at 970 Eighth Avenue. RP (12/12/13) at 155. Exhibit 4. The apartment is located within the thousand foot buffer denoted on the map by a red circle. RP (12/12/13) at 158.

The defense rested without calling witnesses. RP (12/13/13) at 7.

E. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. BROGAN'S RIGHT TO DUE PROCESS AND ALSO VIOLATED CrR 6.15 WHEN IT ORDERED THE JURY TO RECONVENE THE FOLLOWING MONDAY, AFTER THE JURY ANNOUNCED THAT IT WAS DEADLOCKED THE PREVIOUS FRIDAY.

A criminal defendant's right to a fair trial before an impartial jury is protected by the federal and state constitutions. U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22. The Washington Constitution also requires a jury verdict be based on unanimity that every element was proven beyond a reasonable doubt. Const. art. I, §§ 21, 22; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

In addition, each juror must be permitted to reach his or her verdict uninfluenced by factors other than the evidence, the court's proper instructions, and argument of counsel. *State v. Goldberg*, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003); *State v. Boogaard*, 90 Wn.2d 733, 736, 585 P.2d 789 (1978). Thus, due process requires that the trial court judge not bring coercive pressure on the jury deliberations. *Boogaard*, 90 Wn.2d at 736-37.

When a jury is deadlocked, the trial court has authority to require the jury to continue deliberations, although that authority is limited. CrR

6.16(a)(3). The right to a fair and impartial jury trial requires that the judge not bring coercive pressure to bear upon the deliberations of a criminal jury. Under the limitations placed on the trial court, CrR 6.16(a)(3) prevents the trial court from instructing a deadlocked jury in a manner that suggests (1) the need for agreement, (2) the consequences of not agreeing on a unanimous verdict, or (3) the length of time the jury should deliberate. CrR 6.15(f)(2). The purpose of the rule is to prevent judicial intervention into the deliberative process and to ensure that the court does not instruct the jury in such a way as to suggest the need for agreement after deliberations have begun. *State v. Watkins*, 99 Wn.2d 166, 175, 660 P.2d 1117 (1983); *Boogaard*, 90 Wn.2d at 736, 738.

When a jury declares it is unable to reach a verdict, the judge may consider the complexity of the case and the length of deliberations relative to the length of the trial, make limited inquiries of the jury that do not amount to impermissible coercion, and then determine whether to discharge the jury or order them to resume their deliberations. *State v. Jones*, 97 Wn.2d 159, 165, 641 P.2d 708 (1982); The Washington Pattern Jury Instructions provide an instruction for judges to read when the jury indicates it may be deadlocked or the court is considering possible discharge for that reason. The instruction simply calls for the court to ask the presiding jury if "there is a reasonable

probability of the jury reaching a verdict within a reasonable time." 11 Wash. Pract. Pattern Jury Instructions Criminal, WPIC 4.70.

Here, the jury had deliberated more than five hours before informing the court that it was unable to reach a verdict. When the court received the message regarding the deadlock, the judge called the jurors into open court and conducted the following inquiry:

THE COURT: I have called you back into the courtroom to find out whether you have a reasonable probability of reaching a verdict. First, a word of caution, because you are in the process of deliberating, it is essential that you give no indication about how the deliberations are going. You must not make any remark here in the courtroom that may adversely affect the rights of either party or may, in any way, disclose your opinion of the case or the opinions of other members of the jury.

I'm going to ask you, as the Presiding Juror, if there is a reasonable probability of the jury reaching a verdict within a reasonable time. You must restrict your answer to yes or no when I ask you this question and you mustn't not say anything else.

So, with that, is a reasonable probability of the jury reaching a verdict within a reasonable time in this matter? . .

JUROR: No.

THE COURT: All right.

RP (12/13/13) at 50-51.

The jury was polled and all responded that they were in agreement that they were unable to reach a verdict. RP (12/13/13) at 50-51.

The court then excused the jury and directed them to return to the

jury room. RP (12/13/13) at 51.

After discussion with counsel, the jury was brought into the courtroom and were released until the following Monday morning. RP (12/13/13) at 57.

On Monday, December 16, 2013, the court announced that the jury had reached a verdict. The jury was brought into the courtroom at 9:44 a.m. RP (12/16/13) at 11. The jury was polled and each juror indicated the verdict represented the verdict of the jury and his or her individual verdict. (12/16/13) at 13-15.

Under these circumstances, the court's conduct was inherently coercive. First, the jury deliberated a significant amount of time, more than five hours, relative to the length of the trial testimony, which was approximately four hours of testimony. Second, the jury was presented with only one real issue, that is, whether Brogan sold drugs to Hart.

Brogan argues that based on the foregoing, this Court should conclude that by ordering the jury to return on Monday, and by ignoring the jury's unequivocal announcement on the previous Friday afternoon that it was deadlocked, the court improperly coerced a verdict.

A Court may review this issue for the first time on appeal because it involves a manifest error affecting a constitutional right. Appellate courts may review an alleged error raised for the first time on appeal if it is a manifest

error affecting a constitutional right. RAP 2.5(a)(3); *State v. Ford*, 151 Wn.App. 530, 538, 213 P.3d 54 (2009) (citing *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001)). Where it is substantially likely that a trial court's error in requiring a deadlocked jury to return to the court after the weekend for further deliberation affected the outcome of the trial, the error is a manifest error affecting a constitutional right. *Ford*, 151 Wn. App. at 540-41. Because it is substantially likely that the trial court's direction to return caused one or more jurors to change their votes in order to reach a verdict, this error affected Mr. Brogan's constitutional right to a trial by a fair and impartial jury, and this Court may review the issue for the first time on appeal.

Where it is substantially likely that the trial court's order to a deadlocked jury affected the jury's verdict, the defendant is entitled to a new trial. *Ford*, 151 Wn. App. at 538. Here, the jury was unequivocal that it was deadlocked on Friday afternoon. After being ordered to return on Monday morning, the jury almost immediately reached a verdict. Brogan submits that the record shows that the court improperly coerced the verdict. Therefore, the case should be remanded for new trial. *See Boogaard*, 90 Wn.2d at 738.

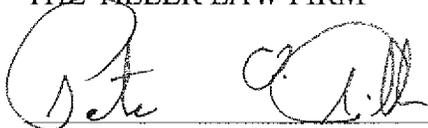
F. CONCLUSION

The trial court improperly coerced a deadlocked jury to continue deliberations and reach a verdict. For the foregoing reasons, Mr. Brogan

respectfully requests this Court to reverse his conviction.

DATED: August 13, 2014.

Respectfully submitted,
THE TILLER LAW FIRM

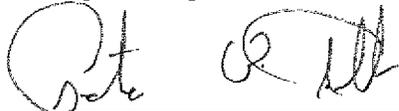


PETER B. TILLER-WSBA 20835
Of Attorneys for Michael Brogan

CERTIFICATE OF SERVICE

The undersigned certifies that on August 13, 2014, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to Ms. Susan Baur, Cowlitz Co. Prosecutor's Office, 312 SW 1st Ave., Kelso, WA 98626-1799, and appellant, Mr. Michael Brogan, DOC NO. 313760, Coyote Ridge Correction Center, PO Box 769, Connell, WA 99326, true and correct copies of this Opening Brief of Appellant.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on August 13, 2014.



PETER B. TILLER

APPENDIX A

RULE CrR 6.15 INSTRUCTIONS AND ARGUMENT

(a) Proposed Instructions. Proposed jury instructions shall be served and filed when a case is called for trial by serving one copy upon counsel for each party, by filing one copy with the clerk, and by delivering the original and one additional copy for each party to the trial judge. Additional instructions, which could not be reasonably anticipated, shall be served and filed at any time before the court has instructed the jury.

Not less than 10 days before the date of trial, the court may order counsel to serve and file proposed instructions not less than 3 days before the trial date.

Each proposed instruction shall be on a separate sheet of paper. The original shall not be numbered nor include citations of authority.

Any superior court may adopt special rules permitting certain instructions to be requested by number from any published book of instructions.

(b) (Reserved.)

(c) Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the

instructions in their final form.

(d) Instructing the Jury and Argument of Counsel. The court shall read the instructions to the jury. The prosecution may then address the jury after which the defense may address the jury followed by the prosecutions rebuttal.

(e) Deliberation. After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.

(f) Questions from Jury During Deliberations.

(1) The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

(2) After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

(g) Several Offenses. The verdict forms for an offense charged or necessarily included in the offense charged or an attempt to commit either the offense charged or any offense necessarily included therein may be submitted to the jury.

TILLER LAW OFFICE

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Transmittal Letter

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